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7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 INTERNATIONAL BROTHERHOOD OF)
TEAMSTERS, LOCAL 439,)

11)
12 Petitioner,)

13 v.)

14 SAFEWAY, INC.,)

15 Respondent.)
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Case No. C08-02536-JL-ADR

**RESPONSE TO NOTICE OF
PENDENCY OF OTHER ACTION OR
PROCEEDING**

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Respondent Safeway, Inc. ("Safeway"), by and through its attorneys, hereby submits the following response in opposition to Petitioner International Brotherhood of Teamsters, Local 439's ("Union's") Notice of Pendency of Other Action or Proceeding:

I. INTRODUCTION

Safeway's Complaint for Speedy Declaratory Relief, An Order Compelling Arbitration, and Damages, Case No. 2:08-cv-01136-JAM-JFM ("Complaint"), which Safeway filed in the United States District Court for the Eastern District of California ("Eastern District"), is properly before the Eastern District. The Complaint should not be transferred to the United States District Court for the Northern District of California ("Northern District" or "this court") because venue is not appropriate in the Northern District. Instead, this court should outright dismiss the Union's Petition to Confirm Arbitration Awards ("Petition"), which is currently pending before this court. (Docket # 1.)¹ This court does not have the authority to confirm those awards because the parties never agreed that a district court would enter judgment upon the issuance of arbitration awards. Moreover, the awards at issue are not final and not properly before this court.

Alternatively, this court should transfer the Petition to the Eastern District under 28 U.S.C. § 1404. This court should not effect the transfer of the Complaint to this court under 28 U.S.C. § 1407, as requested by the Union, because venue is not appropriate in this district. The parties reside in the Eastern District; the Union's principal place of business is in Stockton, California, and Safeway's Distribution Center at issue in the Complaint and Petition is located in Tracy, California. Additionally, the arbitrations at issue all occurred in the Eastern District, and many of the witnesses involved in the underlying grievances and disputes relevant to the Petition work in the Eastern District. Consequently, the Union's request that this court transfer the Complaint to this court should be denied.

¹ All references to the "Docket" contained herein are to this court's docket in the above-captioned case.

II. FACTUAL AND PROCEDURAL BACKGROUND

Safeway refers the court to the Factual and Procedural Background set forth in Safeway's Response and Opposition to Petition to Confirm Arbitration Awards; Motion to Transfer Or Stay Action Or to Vacate Arbitration Awards ("Response"). (Docket # 4 at 8-16.) Since Safeway filed its response, the following additional facts have developed:

The parties had another arbitration hearing before Arbitrator Bridgewater on June 12, 2008. (Declaration of Christian J. Rowley, attached hereto as Exhibit A, at ¶ 2.) At the hearing, Safeway again objected to Arbitrator Bridgewater's authority to hear grievances between the parties:

Mr. Ruygrok: . . . [A]nd again, this is for reiteration purposes and for the record since we are now on the record, we reiterate our position that, one, you don't have authority to hear this case despite your ruling; two, that your authority to determine your own authority, we object to that. And to protect – and are not waiving any arguments [in] that respect.

We're here obviously so that there's not a decision without us being represented or heard in this matter.

Finally, that we again are not waiving any of our arguments with respect to your authority to hear the case or the fact that your position as an arbitrator at this Board of Adjustment has been terminated.

. . . And the court has – at least it's our position the court has the authority to make that determination.

(Exhibit A at ¶ 3, Exhibit 1 at 25.) After that objection by Safeway, Arbitrator Bridgewater stated that her May 7 award did not decide those issues:

The Arbitrator: And the arbitrator would like to state for the record that the arbitrator has not made a ruling as to whether or not she has authority to rule in this matter. The arbitrator's letters were clear and unambiguous in that she's appearing here based on the union's position that she has authority.

(Exhibit A at ¶ 4, Exhibit 1 at 25-26.) (emphasis added). The Union then reiterated its position that the June 12 hearing was proper and that Safeway did not have a right under the CBA to unilaterally terminate the arbitrator. (Exhibit A at ¶ 5, Exhibit 1 at 26.) Following those objections and statements on the records, Arbitrator Bridgewater continued to hear the issues the Union presented to her at the June 12 hearing. (Exhibit A at ¶ 6.) Arbitrator Bridgewater will continue to hear grievances between the parties each month until the CBA expires on September

27, 2008. (Docket # 4, Exhibit A at ¶ 21.)

III. LEGAL ARGUMENT

A. The Court Should Deny The Petition Because The Parties Have Not Consented To The Entry Of Judgment Upon Arbitration Awards.

The court's jurisdiction over this action is based on Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* Section 9 of the FAA provides federal district courts with authority to confirm arbitration awards, but only if "the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration." 9 U.S.C. § 9. Courts will not confirm arbitration awards absent such specific agreement by the parties. *See, e.g., Commonwealth Enterps. v. Liberty Mutual Ins. Co.*, No. CA 91-55892, 1992 U.S. App. LEXIS 6121, at *5-*8 (9th Cir. Mar. 27, 1992), *aff'd*, 958 F.2d 376 (9th Cir. 1992) ("[C]onfirmation of an arbitration award is appropriate only where the parties in their agreement have agreed that a judgment of the court shall be entered upon the award.") (quotations omitted); *Varley v. Tarrytown Assocs., Inc.*, 477 F.2d 208, 210 (2d Cir. 1973) (same); *American Pres. Lines, Ltd. v. Trans Atlantic Assocs., Inc.*, No. C-04-1515 EDL, 2004 U.S. Dist. LEXIS 16852, at *4 (N.D. Cal. Aug. 17, 2004) ("The district court must grant a timely motion to confirm an arbitration award: (1) *if the parties have agreed that a court judgment shall be entered on the award; and* (2) unless the arbitration award is vacated, modified or corrected.") (emphasis added).

The parties in this case have not agreed that court judgments shall be entered upon arbitration awards. Indeed, the CBA's grievance-arbitration provision is completely silent on the issue. (Docket # 4, Exhibit A at ¶ 12, Exhibit 1 at 21-24.) Accordingly, the court has no authority to confirm the arbitration awards at issue here. *See, e.g., Commonwealth Enterps.*, 1992 U.S. App. LEXIS 6121, at *6 (affirming the district court's denial of petition to confirm arbitration award where "nothing in the [arbitration agreement] indicated that a court judgment would be entered upon the award"). *Compare American Pres. Lines*, 2004 U.S. Dist. LEXIS

16852, at *4-*5 (confirming award because the parties' arbitration agreement provided that awards "may be enforced by any court . . . as may properly assert jurisdiction"). Thus, for this reason alone, the court should deny the Union's petition.

B. The Court Should Further Deny The Petition Because The Arbitration Awards Are Not Final.

As a general rule, a court cannot review an arbitration decision until the decision is final. *See, e.g., General Drivers, Warehousemen & Helpers v. Riss & Co.*, 372 U.S. 517, 519 (1963). A decision is not final until all of the issues associated with the award are final. *See, e.g., Public Serv. Elec. & Gas Co. v. Sys. Council U-2*, 703 F.2d 68, 69-70 (3d Cir. 1983) (parties to a labor arbitration had agreed to bifurcate the determination of liability and remedy but court held that the determination of liability alone was not a reviewable final and binding award); 22A FED. PROC. § 52:2002 (Lawyers ed. 2003) ("Generally, a District Court may review an arbitrator's rulings pursuant to 29 U.S.C.A. § 185 only after there is a final award containing findings as to liability and as to the remedy."). As the Ninth Circuit has noted approvingly, the "Second Circuit has held that an arbitration award under the Federal Arbitration Act, . . . is a reviewable final order only if intended by the arbitrator to be a complete determination of the claims, including the issue of damages." *Millmen's Local 550, United Bhd. of Carpenters & Joiners v. Wells Exterior Trim*, 828 F.2d 1373, 1376 (9th Cir. 1987) (citing *Michaels v. Mariforum Shipping*, 624 F.2d 411, 413-14 (2d Cir. 1980).

Neither arbitration award at issue in this case is final. With respect to Arbitrator Bridgewater's May 14, 2008 decision, Arbitrator Bridgewater decided merely the issue of substantive arbitrability, *i.e.*, whether the issue of Safeway's compliance with a February 1, 2008 settlement agreement was arbitrable under the parties' CBA. Arbitrator Bridgewater has not decided the merits of the case, even though she intends to do so over Safeway's continuing objection. With respect to Arbitrator Bridgewater's May 7, 2008 decision, Arbitrator Bridgewater expressly has not decided the issue of whether she has jurisdiction to hear grievances between the parties given her termination on April 14, 2008. (Exhibit A at ¶ 4, Exhibit 1 at 25-26.) The Union's claim that her May 7 award is final is, thus, entirely without

merit. Even if she had decided that issue, she has not decided the merits of any grievances heard subsequent to her termination. Because Arbitrator Bridgewater has not yet heard the merits of any of the grievances related to her May 14 or May 7 awards, those awards are not final because they are not a complete determination of the Union's claims and, therefore, are not subject to review by the court. *See, e.g., Millmen's*, 28 F.2d at 1376-77. Consequently, the court should deny the Union's petition for this additional reason.

C. Alternatively, The Court Should Transfer This Action To The Eastern District Of California.

A court has statutory authority to transfer a case to another district. Section 1404(a) specifically provides that: "[f]or the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). To successfully move for transfer under Section 1404(a), Safeway must establish that the action could have been brought in the district to which transfer is sought. *See, e.g., Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979). Safeway also bears the burden of "establishing that the action should be transferred." *Los Angeles Memorial Comm'n v. Nat'l Football League*, 89 F.R.D. 497, 499 (C.D. Cal. 1981), *aff'd*, 726 F.2d 1381 (9th Cir. 1984). As explained in detail below, Safeway meets its burden in both respects. Indeed, transfer is particularly appropriate in this case because the related action that Safeway filed in the Eastern District of California ("Eastern District") involves the same parties and similar issues (*e.g.*, whether Arbitrator Bridgewater has authority to hear and decide grievances between the parties). *See, e.g., Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 196-97 (2000).

1. The Union's petition could have been brought in the Eastern District.

Section 9 of the FAA provides that a petition to confirm an arbitration award "may be made to the United States court in and for the district within which such award was made." 9 U.S.C. § 9. However, the venue provision in Section 9 is permissive and subject to the general venue statute. *See, e.g., Cortez Byrd*, 529 U.S. at 204; *Textile Unlimited, Inc. v. A. Bmhand Co.*,

1 *Inc.*, 240 F.3d 781, 784 (9th Cir. 2001). Section 1391(b), which is the general venue statute that
 2 applies in this case because the petition is based on federal question jurisdiction under Section
 3 301 of the LMRA, provides in pertinent part that venue is appropriate in any district where any
 4 defendant resides or where a substantial part of the events giving rise to the claim occurred. 28
 5 U.S.C. § 1391(b). Accordingly, the Union could have brought the petition in the Eastern District
 6 because Safeway resides there, the arbitrations occurred there, and the underlying facts
 7 pertaining to the grievances occurred there (not to mention that the Union resides there as well).
 8 Thus, Safeway has met the first part of the transfer test by establishing “that the action could
 9 originally have been brought in the [Eastern District of California].” *Commodity Futures*, 611
 10 F.2d at 279.

11 **2. The Union’s petition should be transferred to the**
 12 **Eastern District.**

13 In ruling on a motion to transfer, the court must consider each of the factors enumerated
 14 in Section 1404(a), *i.e.*, convenience of the parties, convenience of the witnesses, and the
 15 interests of justice. 28 U.S.C. § 1404(a). Other relevant factors include: the plaintiff’s choice of
 16 forum, the local interest in the issue, the relative ease of access to evidence, the availability of
 17 compulsory process for unwilling witnesses and the cost involved in securing willing witnesses,
 18 and the practical issues that make a case easier or more difficult to try in a given forum. *See*
 19 *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). As explained
 20 below, most – if not all – of these factors weigh in favor of transferring the case to the Eastern
 21 District.

22 **a. The Eastern District is a more convenient forum**
 23 **for the parties.**

24 Both parties reside in the Eastern District. The Union’s principal place of business is in
 25 Stockton, California. (Docket # 4, Exhibit A at ¶ 6.) Similarly, Safeway’s Distribution Center is
 26 located in Tracy, California, and Safeway employees that the Union represents work in that
 27 facility. (*Id.* at ¶¶ 2, 4-5.) Given that both parties reside in the Eastern District, that the
 28 arbitrations occurred there (Docket # 4, Exhibit A at ¶ 15 and Exhibit B at ¶ 16), that many of the

witnesses involved in the underlying grievances and the disputes relevant to this lawsuit work there, it will be more convenient for the parties to try a case in that court.

b. The Eastern District is a convenient forum for the witnesses.

Safeway intends to call at least two witnesses at any trial in this matter, Doug Ruygrok and Carl Ramnitz. Mr. Ruygrok and Mr. Ramnitz are both responsible for labor relations at the Distribution Center. (Docket # 4, Exhibit A at ¶ 2 and Exhibit B at ¶ 2.) At trial, they would testify to the topics included in their declarations. (Docket # 4, Exhibits A and B.) Through their employment at Safeway, both Mr. Ruygrok and Mr. Ramnitz work at or visit the Distribution Center in the Eastern District. (Docket # 4, Exhibit A at ¶ 2 and Exhibit B at ¶ 2.) As such, the Eastern District is a convenient forum for them.

Safeway does not know whom the Union would call as witnesses at any trial in this matter. However, Safeway assumes that such witnesses would include Union representatives and business agents. Because the Union's principal place of business is in the Eastern District and because the Union's representatives and business agents represent employees at the Distribution Center in that district (Docket # 4, Exhibit A at ¶ 2, 5-6), the Eastern District would not be an inconvenient forum for the Union's witnesses.

c. The interests of justice favor transfer to the Eastern District.

Transfer is appropriate for the additional reason that this court is in the preliminary stage of proceedings. *See, e.g., Meyers v. Ciano*, No. C 01-3955 TEH, 2002 U.S. Dist. LEXIS 2556, at *10 (N.D. Cal. Feb. 12, 2002) (finding it was within the interests of justice to transfer the action because litigation had not progressed far). Although the Eastern District likewise is in the preliminary stage of proceedings on Safeway's complaint, the interests of justice still weigh in favor of transferring the action because of judicial economy. Safeway could not have brought its declaratory judgment action in this court because venue is not proper here. The Union, the only defendant in that case, is not a resident of this judicial district. (Docket # 4, Exhibit A at ¶ 6.) Moreover, a substantial part of the events giving rise to Safeway's claims in its complaint did not

1 occur in this judicial district. Rather, the arbitrations and CBA at issue all occurred or were
 2 entered into in the Eastern District. (Docket # 4, Exhibit A at ¶ 15 and Exhibit B at ¶ 16.)
 3 Additionally, the underlying facts related to the grievances at issue occurred in that district.
 4 (Docket # 4, Exhibit A at ¶ 2, 5 and Exhibit B at ¶ 2, 4.) Consequently, if this court refuses to
 5 deny the petition or to transfer the action, then two closely related proceedings will be occurring
 6 in two different judicial districts, wasting both the parties' and the judiciary's resources. The
 7 interests of justice plainly favor the transfer of this action.

8 **d. The Eastern District's interest in the action**
 9 **outweighs the Union's choice of forum.**

10 The Eastern District has local interest in this action for a number of reasons. First, the
 11 Distribution Center at issue is located in that district. (Docket # 4, Exhibit A at ¶ 2.) Second, the
 12 Union's principal place of business is located in that district. (*Id.* at ¶ 6.) Third, the arbitrations
 13 at issue occurred or will occur in that district. (Docket # 4, Exhibit A at ¶ 15 and Exhibit B at ¶
 14 16.) Fourth, the employees subject to the parties' CBA work in that district, and many of them
 15 reside in that district. (Docket # 4, Exhibit A at ¶ 4.) In comparison, this district has no
 16 particular interest in the subject matter of this dispute other than the fact that Arbitrator
 17 Bridgewater resides in this district, and she is not a party to this dispute. Given the Eastern
 18 District's local interest in this case, this court should transfer the action to that district.

19 Although the Union's choice of forum is one factor that the court should consider when
 20 deciding to transfer an action, the court should give the Union's choice of forum little weight in
 21 this case. Indeed, this court has held that where, as here, the local interest lies so heavily in
 22 another district the plaintiff's choice of forum should be given minimal weight in the transfer
 23 analysis. *See, e.g., Meyers*, 2002 U.S. Dist. LEXIS 2556, at *8-*9 (holding that a plaintiff's
 24 choice of forum should only be afforded minimal consideration where "she is not a resident of
 25 the district where she instituted suit, the operative facts have not occurred within the forum, and
 26 the forum has no particular interest in the parties or the subject matter"). Moreover, the Union
 27 filed this suit only after Safeway gave notice that it would file a complaint in the Eastern District.
 28 Such anticipatory suits "are disfavored because they are examples of forum shopping."

1 *Mediastream, Inc. v. Priddis Music, Inc.*, No. C 07-2127 PJH, 2007 U.S. Dist. LEXIS 73707, at
 2 *7 (N.D. Cal. Sept. 24, 2007). Thus, the Union's choice of forum should be given minimal
 3 weight for this additional reason. *See, e.g., Alltrade Inc. v. Uniweld Prods, Inc.*, 946 F.2d 622,
 4 628 (9th Cir. 1991) (finding that courts should disregard the plaintiff's forum choice if the suit is
 5 a result of forum shopping).

6 **e. The relative ease of access to evidence favors**
 7 **transferring this action to the Eastern District.**

8 As set forth above, the Distribution Center and the Union's offices are located in the
 9 Eastern District. Because the disputes center around contract interpretation issues, any evidence
 10 would be located in that district. The Distribution Center houses the CBA, grievance paperwork,
 11 and bargaining history. (Docket # 4, Exhibit A at ¶ 8.) Similarly, Safeway assumes that the
 12 Union's offices house the CBA, relevant grievance paperwork, and relevant bargaining history.
 13 None of the evidence is located in this district. Thus, the relative ease of access to evidence
 14 weighs in favor of transferring this action to the Eastern District.

15 **f. The availability of compulsory process for**
 16 **unwilling witnesses and the costs involved in**
 17 **securing willing witnesses favor transferring this**
 18 **action to the Eastern District.**

19 As of this time, Safeway is unaware of any unwilling witnesses. However, if the need to
 20 subpoena any unwilling witness arose, it is most likely that the subpoena would need to issue
 21 from the Eastern District because the Distribution Center and the Union's offices are located in
 22 that district. Moreover, for the reasons set forth in Section "b" above, Safeway's willing
 23 witnesses and the Union's likely witnesses work and/or reside in the Eastern District, and their
 24 costs of appearing there would be minimal. Accordingly, this factor favors transferring this
 25 action to the Eastern District.

26 **g. Practical considerations make it easier to try this**
 27 **case in the Eastern District.**

28 This case is related to grievances, ongoing arbitrations, and future arbitrations that are
 occurring in the Eastern District. (Docket # 4, Exhibit A at ¶ 2, 4-5, 15 and Exhibit B at ¶ 16.)
 Moreover, this case is substantially related to the proceedings pursuant to Safeway's complaint

1 filed in that district. (Docket # 4, Exhibit C at ¶ 5.) Because witnesses and counsel are handling
2 those grievances and ongoing arbitrations, future arbitrations, and court proceedings are
3 occurring in the Eastern District. (Docket # 4, Exhibit A at ¶ 15, Exhibit B at ¶ 16, and Exhibit C
4 at ¶ 5), it makes logistical sense to have this case proceed in that district as well. Thus, this
5 factor weighs in favor of venue transfer.

6 Based on all of the foregoing, it is apparent that the bulk of the venue transfer factors
7 favor transferring this action to the Eastern District. Accordingly, the court should transfer the
8 action to that court in the event that it does not dismiss the action outright. *See, e.g., Cortez*, 529
9 U.S. at 203-04 (holding that court should have carefully considered petitioner's motion to
10 transfer where petitioner filed a petition to vacate an arbitration award in one district and
11 respondent filed a petition to confirm the award in another district and venue was appropriate in
12 both courts).

13 **IV. CONCLUSION**

14 For the foregoing reasons, Safeway respectfully requests this court not to effect the
15 transfer of the Complaint in the Eastern District to this court. Instead, this court should dismiss
16 the Union's Petition outright or transfer the Petition to the Eastern District.

17 DATED: June 30, 2008

SEYFARTH SHAW LLP

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20 By _____/s/_____
Christian J. Rowley
21 Attorneys for Respondent
SAFEWAY INC.
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EXHIBIT A

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SAFEWAY, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 439,

Petitioner,

v.

Safeway, Inc.,

Respondent.

Case No. C08-02536-JL-ADR

**DECLARATION OF CHRISTIAN J.
ROWLEY**

I, Christian J. Rowley, declare:

1. I am an attorney at law licensed to practice before all Courts of the State of California, the United States District Court for the Northern District of California, and the United States District Court for the Eastern District of California. I am a partner with the law firm of Seyfarth Shaw LLP, and counsel of record for Respondent Safeway, Inc. I have personal knowledge of the facts set forth in this declaration, and if called as a witness for this purpose, I could and would testify competently under oath to them.

2. The parties had another arbitration hearing before Arbitrator Bridgewater on June 12, 2008. True and correct copies of the relevant pages of the transcript from that hearing are attached as Exhibit 1.

1 3. At the hearing, Safeway again objected to Arbitrator Bridgewater's authority to hear
2 grievances between the parties:

3 Mr. Ruygrok: . . . [A]nd again, this is for reiteration purposes and for the record
4 since we are now on the record, we reiterate our position that, one, you don't have
5 authority to hear this case despite your ruling; two, that your authority to
6 determine your own authority, we object to that. And to protect – and are not
7 waiving any arguments [in] that respect.

8 We're here obviously so that there's not a decision without us being represented
9 or heard in this matter.

10 Finally, that we again are not waiving any of our arguments with respect to your
11 authority to hear the case or the fact that your position as an arbitrator at this
12 Board of Adjustment has been terminated.

13 . . . And the court has – at least it's our position the court has the authority to
14 make that determination.

15 *See* Exhibit 1 at 25.

16 4. After that objection by Safeway, Arbitrator Bridgewater stated that her May 7 award
17 did not decide those issues:

18 The Arbitrator: And the arbitrator would like to state for the record that the
19 arbitrator has not made a ruling as to whether or not she has authority to rule in
20 this matter. The arbitrator's letters were clear and unambiguous in that she's
21 appearing here based on the union's position that she has authority.

22 *Id.* at 25-26.

23 5. The Union then reiterated its position that the June 12 hearing was proper and that
24 Safeway did not have a right under the CBA to unilaterally terminate the arbitrator. *Id.* at 26.

25 6. Following those objections and statements on the records, Arbitrator Bridgewater
26 continued to hear the issues the Union presented to her at the June 12 hearing.

27 I declare under penalty of perjury under the laws of the State of California that the
28 foregoing is true and correct. Executed this June 30, 2008, in San Francisco, California.

/s/ Christian J. Rowley
Christian J. Rowley

EXHIBIT 1

Arbitration

1

IN ARBITRATION PROCEEDINGS

PURSUANT TO AGREEMENT BETWEEN THE PARTIES

| | | |
|----------------------|---|----------------|
| IN THE MATTER OF A |) | |
| CONTROVERSY BETWEEN: |) | |
| |) | |
| IBT LOCAL 439, |) | No. Unassigned |
| |) | |
| Union, |) | |
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| SAFEWAY, INC., |) | Volume One |
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| Company/Employer. |) | |
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BOARD OF ADJUSTMENT MEETING
AND ARBITRATION HEARING

DATE: June 12, 2008, at 10:25 a.m.

ARBITRATOR: BARBARA BRIDGEWATER
2116 Eighth Street
Berkeley, California 94710-2374

REPORTER: Patricia Coward, CSR No. 5142

LOCATION: Holiday Inn Express
3751 Tracy Boulevard
Tracy, California 95304

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Carol Nygard & Associates
916-928-8999

Arbitration

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| 1 APPEARANCES: 2 ARBITRATOR: Barbara Bridgewater 3 4 BOARD OF ADJUSTMENT MEMBERS: 5 Barbara Bridgewater 6 Daniel Lee 7 Charles Tryon 8 Kurt Steinhoff 9 Michelle Scott 10 11 FOR THE UNION: 12 ED SPECKMAN, Business Representative 13 Teamsters Local 439 14 1531 East Fremont Street 15 Stockton, CA 95201 16 David Rosenfeld and Sarah McBride, Attorneys at Law, 17 with the Law Offices of Weinberg, Roger & Rosenfeld 18 19 Sam Rosas 20 Pablo Barrera 21 22 FOR THE COMPANY: 23 DOUG RUYGROK, Safeway 24 Supply and Distribution 25 618 Michillinda Avenue Arcadia, CA 91007 Christian J. Rowley, Attorney At Law, with the Law Offices of Seyfarth & Shaw Rich Cox Ben Ploshay --o0o-- | 1 INDEX OF EXAMINATION 2 3 WITNESSES: DIRECT CROSS REDIRECT RECROSS 4 5 CALLED BY THE UNION: 6 PABLO BARRERA 38 56 68 69 7 75 73 8 SAM ROSAS 76 107 132 141 9 145 146 10 PHILLIP CREAMER 91 94 11 97 12 JOHN WILLIAMS 99 13 (via telephone) 14 --o0o-- 15 16 INDEX OF EXHIBITS 17 EXHIBIT NUMBER AND DESCRIPTION: IDEN. EVID. 18 JOINT EXHIBITS: 19 1 Agreement 20 (Marked in prior proceedings) 21 22 UNION EXHIBITS: 23 1 Settlement Agreement 24 (marked in prior proceedings) 25 2 2 Seven pages of photographs 43 48 3 4 3 Warehouse Stock-Out 48 49 5 documents 6 4 Seven pages of photographs 50 52 7 5 19 pages of photographs 52 56 8 9 (continued) 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 |
| 1 BOARD OF ADJUSTMENT HEARING 2 BEGINS: PAGE 3 7 4 INDEX OF WITNESSES 5 WITNESSES: DIRECT CROSS REDIRECT RECROSS 6 CALLED BY THE UNION: 7 ED SPECKMAN 9 11 12 8 --o0o-- 9 10 CLOSING STATEMENTS 11 BY: PAGE 12 Mr. Rowley 14 13 Mr. Rosenfeld 16 14 --o0o-- 15 16 BEGINNING OF ARBITRATION HEARING 17 BEGINS: PAGE 18 [Reporter's Note: Begin Arbitration 24 19 portion of proceedings] 20 Mass swearing in of all potential witnesses 31 21 22 OPENING STATEMENTS 23 BY: PAGE 24 Mr. Ruygrok 32 25 --o0o-- | 1 INDEX OF EXHIBITS 2 3 EXHIBIT NUMBER AND DESCRIPTION: IDEN. EVID. 4 5 COMPANY EXHIBITS: 6 1 Document titled 116 119 7 "Important Notice" 8 2 Employee names, hire dates, 121 123 9 full-time dates, and 10 departments 11 --o0o-- 12 13 14 15 16 17 18 19 20 21 22 23 24 25 |

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| <p>1 From: CAROL NYGARD & ASSOCIATES 2 CERTIFIED SHORTHAND REPORTERS 3 4180 TRUXEL ROAD, SUITE 100 4 SACRAMENTO, CALIFORNIA 95834 5 Telephone: (916) 928-8999 6 Fax: (916) 928-9989</p> <p>7 June 28, 2008</p> <p>8 SEYFARTH & SHAW ED SPECKMAN 9 BY: CHRISTIAN J. ROWLEY BUSINESS REPRESENTATIVE 10 ATTORNEY AT LAW TEAMSTERS LOCAL 439 11 60 Mission Street 1531 East Fremont Street 12 Suite 3100 Stockton, CA 95201 13 San Francisco, CA 94105</p> <p>14 Re: IBT Local 439 and Safeway Stores, Inc. 15 Hearing of June 12, 2008 16 Counsel: 17 The transcript of Volume I of the above Board of 18 Adjustment and Arbitration hearing has now been 19 completed, and a copy is enclosed herein for each 20 attorney. The original transcript has been forwarded 21 to the arbitrator. 22 Thank you for your referral of this matter to our 23 office.</p> <p>24 Yours very truly, 25 CAROL NYGARD & ASSOCIATES</p> <p>By: Patricia Coward Certified Shorthand Reporter cc: Barbara Bridgewater, Arbitrator</p> | <p>1 So we don't have witnesses right now on the 2 bargaining history, although our position is frankly 3 the bargaining history is not relevant given the clear 4 language of the contract in this case, and in any event 5 as I'll discuss later on, the bargaining history 6 actually has -- as testified.</p> <p>7 UNIDENTIFIED SPEAKER: We can't hear you. 8 MR. ROWLEY: I'm sorry, the bargaining history 9 as testified by Mr. Tauriac and Mr. Speckman actually 10 supports the -- Safeway's position that an attorney is 11 entitled to be here, but we can argue that later.</p> <p>12 THE ARBITRATOR: Did you want to present any 13 other witnesses on the issue of whether attorneys can 14 be present at a board of adjustments?</p> <p>15 MR. ROWLEY: No, ma'am. 16 THE ARBITRATOR: So the company rests. 17 MR. ROWLEY: The company rests, yes. 18 THE COURT: Would the union like to present any 19 further?</p> <p>20 MR. ROSENFELD: No. We rest, too, on the 21 issue -- hold on a second. 22 THE ARBITRATOR: Off the record a minute. 23 (Brief pause.) 24 MR. ROSENFELD: I do think we are going to call 25 another witness.</p> |
| <p>1 June 12, 2008, at Tracy, California, 10:25 a.m. 2 --oOo--</p> <p>3 THE ARBITRATOR: Ready to go on the record. So 4 today is June the 12th, 2008. And we're here for a 5 Board of Adjustment. This matter began back in April, 6 specifically on April the 14th, and we had another 7 hearing date on May the 22nd. On May the 22nd, we 8 began around 4:00 p.m., and we had four witnesses, two 9 for the union and two for the company.</p> <p>10 So my understanding, that the issue in May was 11 whether or not attorneys could be present at a Board of 12 Adjustment and that the company was going to have me 13 sign some subpoenas and proceed further with 14 presentation of witnesses; is that correct?</p> <p>15 MR. ROWLEY: Yes, Madam Arbitrator. The 16 subpoenas weren't directly at the arbitrator or to the 17 attorney issue. We did have some subpoenas.</p> <p>18 THE ARBITRATOR: Right.</p> <p>19 MR. ROWLEY: The company had two potential 20 witnesses with regard to the attorney issue. One of 21 the two witnesses has had debilitating strokes and is 22 unable to travel, and the other witness is in Tennessee 23 and no longer works for the company, and he has just 24 started a new job, so he was unavailable to come out 25 and testify.</p> | <p>1 THE ARBITRATOR: Okay. 2 MR. ROSENFELD: Ed Speckman. 3 THE ARBITRATOR: You're still under oath. 4 MR. SPECKMAN: Yeah. 5 THE ARBITRATOR: And so this witness is 6 recalled? 7 MR. ROSENFELD: Right.</p> <p>8 ED SPECKMAN, 9 10 called as a witness by the Union, having been 11 previously sworn to testify the truth, the whole truth, 12 and nothing but the truth, testified further on oath as 13 follows: 14 --oOo--</p> <p>15 DIRECT EXAMINATION BY MR. ROSENFELD</p> <p>16 17 MR. ROSENFELD: Mr. Speckman, are you familiar 18 with what's happened in the past with respect to use of 19 attorneys in contract interpretation cases? 20 A. I believe I am. 21 Q. For how long have you had responsibility for 22 handling these cases with Safeway? 23 A. Since the contract inception in August 2003.</p> |

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| <p>1 going to hear testimony, and it may influence their own 2 testimony. It's human nature.</p> <p>3 The history of this board is to sequester 4 witnesses, and I think we can get testimony if we need 5 to from the members of the panel in fact in that 6 respect. And again, it's not an issue of persuasion or 7 decorum; it's an issue of we don't want their testimony 8 to be influenced or heard by other potential witnesses.</p> <p>9 THE ARBITRATOR: Okay. Any response to the 10 history of sequestering the witnesses of the Board of 11 Adjustment?</p> <p>12 MR. SPECKMAN: When it's been ordered, we've 13 always complied. I can't recall when that's happened, 14 but I know we certainly wouldn't -- I mean if --</p> <p>15 MR. RUYGROK: Well, you acknowledge that it's 16 happened, and you acknowledge that you've complied, and 17 the motion has been made by both sides in the past, 18 both the company and the union.</p> <p>19 THE ARBITRATOR: So, okay.</p> <p>20 MR. SPECKMAN: Okay, how about this: We will 21 agree that any witness that's going to testify will be 22 removed?</p> <p>23 THE ARBITRATOR: Is that acceptable to the 24 company?</p> <p>25 MR. RUYGROK: Give me a moment.</p> <p style="text-align: right;">22</p> | <p>1 attorney, I just need to get my thoughts together for 2 just a moment. Can I, just ten minutes?</p> <p>3 THE ARBITRATOR: The attorneys can be present 4 during the hearing if they're not going to be 5 witnesses, you know.</p> <p>6 MR. SPECKMAN: Yeah, I just need ten minutes.</p> <p>7 THE ARBITRATOR: Okay.</p> <p>8 MR. SPECKMAN: Quite frankly I've never done it 9 in that manner so I need to just consult for a minute.</p> <p>10 THE ARBITRATOR: Okay. We need a break anyway, 11 so we'll taken a ten-minute break. Off the record.</p> <p>12 (A break was taken.)</p> <p>13 [Reporter's Note: Now begins the 14 Arbitration Hearing portion of 15 today's proceedings.]</p> <p>16 THE ARBITRATOR: Let's go on the record. Would 17 the parties like to discuss anything with respect to 18 this matter off the record before we officially start? 19 The exhibits issue, statement of the issue, anything? 20 Or should we stay on the record?</p> <p>21 MR. SPECKMAN: I think at this point we're 22 prepared to go on the record and go forward.</p> <p>23 THE ARBITRATOR: Any -- any agreement as to the 24 statement of the issue?</p> <p>25 MR. SPECKMAN: Not with us.</p> <p style="text-align: right;">24</p> |
| <p>1 (Comments off the record.)</p> <p>2 MR. RUYGROK: Not knowing exactly what we are 3 going to hear from their witnesses, and we believe that 4 all the people here have an interest in the outcome of 5 this arbitration, both with respect to their ability to 6 transfer to the CPS facility, they have an interest in 7 this thing, and we don't know who's going to testify or 8 what they're going to say, and we may want to call some 9 of these individuals ourselves. But to have them 10 present during the merits of the case, we ask that they 11 be sequestered.</p> <p>12 We had a decision made earlier based on the 13 longstanding precedent. The precedent here is, when 14 the party asks for witnesses to be sequestered, they 15 get sequestered.</p> <p>16 MR. SPECKMAN: We agree that witnesses that are 17 going to testify will be removed.</p> <p>18 THE ARBITRATOR: The company's position is that 19 they don't know who they might call. If I make a 20 ruling to sequester all of the union witnesses, that 21 also applies to the company's, so.</p> <p>22 MR. RUYGROK: Of course, we understand.</p> <p>23 THE ARBITRATOR: So everybody out.</p> <p>24 MR. SPECKMAN: And with that, can we just -- and 25 I'm sorry, just so -- with the ruling of the no</p> <p style="text-align: right;">23</p> | <p>1 MR. RUYGROK: Pardon me? Oh, and before we do, 2 and again, this is for reiteration purposes and for the 3 record since we are now on the record, we reiterate our 4 position that, one, you don't have authority to hear 5 this case despite your ruling; two, that your authority 6 to determine your own authority, we object to that. 7 And to protect -- and are not waiving any arguments 8 with that respect.</p> <p>9 We're here obviously so that there's not a 10 decision without us being represented or heard in this 11 matter.</p> <p>12 Finally, that we again are not waiving any of 13 our arguments with respect to your authority to hear 14 the case or the fact that your position as an 15 arbitrator at this Board of Adjustment has been 16 terminated.</p> <p>17 THE ARBITRATOR: And the arbitrator would like 18 the record --</p> <p>19 MR. RUYGROK: And the court has -- at least it's 20 our position the court has the authority to make that 21 determination.</p> <p>22 THE ARBITRATOR: And the arbitrator would like 23 to state for the record that the arbitrator has not 24 made a ruling as to whether or not she has authority to 25 rule in this matter.</p> <p style="text-align: right;">25</p> |

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| <p>1 The arbitrator's letters were clear and</p> <p>2 unambiguous in that she's appearing here based on the</p> <p>3 union's position that she has authority.</p> <p>4 MR. RUYGROK: But --</p> <p>5 MR. SPECKMAN: Just a statement over here, that</p> <p>6 is our position, and the positions that we hold in</p> <p>7 documents, our positions, we're not making any other</p> <p>8 position, and we are maintaining that this is a proper</p> <p>9 proceeding and that it was properly done in accordance</p> <p>10 with the agreement, and that the employer does not have</p> <p>11 a right to unilaterally terminate the arbitrator.</p> <p>12 THE ARBITRATOR: Now, with the would the union</p> <p>13 like to set forth its statement of the issues? What is</p> <p>14 the issue from the union's perspective on the</p> <p>15 substantive matter?</p> <p>16 MR. SPECKMAN: The reason why we are here and</p> <p>17 demanding arbitration is regarding what has been</p> <p>18 provided to the panel already, and that's Union</p> <p>19 Exhibit 1 which is a document that includes 18 pages.</p> <p>20 THE ARBITRATOR: And that was at the April 14 --</p> <p>21 MR. SPECKMAN: That is correct.</p> <p>22 THE ARBITRATOR: -- hearing.</p> <p>23 MR. SPECKMAN: Our position at this point is we</p> <p>24 are not objecting to or have any disagreement with</p> <p>25 Union Exhibit 1, Pages 1 and 2, which is actually the</p> <p style="text-align: right;">26</p> | <p>1 statement of the issues.</p> <p>2 THE ARBITRATOR: Proceed, Mr. Speckman.</p> <p>3 MR. RUYGROK: Well -- okay.</p> <p>4 MR. SPECKMAN: Everything was done in accordance</p> <p>5 with the agreement. Postings were put up. 48 of our</p> <p>6 employees signed to transfer. And they were supposed</p> <p>7 to be transferred on May 1st, and yet the company</p> <p>8 refused to do so. We are here to compel the settlement</p> <p>9 terms of this agreement and to allow our employees that</p> <p>10 have been disadvantaged by this transfer of work to CPS</p> <p>11 to be permitted to transfer. And at this point, no</p> <p>12 employees have transferred.</p> <p>13 THE ARBITRATOR: So the union's issue is whether</p> <p>14 the company violated the settlement agreement by not</p> <p>15 permitting Local 439 members to transfer to CPS?</p> <p>16 MR. SPECKMAN: Correct.</p> <p>17 THE ARBITRATOR: The company's issue.</p> <p>18 MR. RUYGROK: We would propose an issue as</p> <p>19 follows: Did Safeway violate the CPS settlement</p> <p>20 agreement by refusing to transfer 48 employees from the</p> <p>21 439 bargaining unit who were not disadvantaged?</p> <p>22 MR. SPECKMAN: I would object. I would say that</p> <p>23 they have not moved any employees.</p> <p>24 MR. RUYGROK: We would stipulate we have not --</p> <p>25 well, we have moved from the other Local 630, but I</p> <p style="text-align: right;">28</p> |
| <p>1 settlement agreement.</p> <p>2 The part that we do have a dispute with in</p> <p>3 Union 1, Pages 1 and 2, particularly, is number three</p> <p>4 on the settlement document. And that paragraph reads,</p> <p>5 "Upon assuming control of the CPS facility, the company</p> <p>6 agrees to provide a window period of adequate length,</p> <p>7 undefined at this time, in which company employees</p> <p>8 covered by collective bargaining agreements with</p> <p>9 Local 630 and 439, who may have been disadvantaged by</p> <p>10 the transfer of work to CPS will be permitted to</p> <p>11 transfer with their seniority to the CPS facility. Any</p> <p>12 employee who elects to transfer will be permitted to</p> <p>13 return to their original facility with their seniority</p> <p>14 within 90 days of transfer. No further transfers will</p> <p>15 be required." I read verbatim what the settlement</p> <p>16 agreement says.</p> <p>17 Local 439 --</p> <p>18 THE ARBITRATOR: I was just going to say, why</p> <p>19 don't we just consider this the union's opening</p> <p>20 statement.</p> <p>21 MR. RUYGROK: I was going to say, is there a</p> <p>22 statement of issue in this here someplace? Because</p> <p>23 otherwise I'd like to propose one.</p> <p>24 THE ARBITRATOR: Okay.</p> <p>25 MR. SPECKMAN: Well, I was getting to our</p> <p style="text-align: right;">27</p> | <p>1 didn't -- no employees were moved, but he did not agree</p> <p>2 to transfer the 48 employees that he's referring to as</p> <p>3 they were not disadvantaged.</p> <p>4 THE ARBITRATOR: I understand. So Safeway's</p> <p>5 issue is whether Safeway violated the CPS settlement</p> <p>6 agreement by refusing to transfer 48 employees who were</p> <p>7 not disadvantaged?</p> <p>8 MR. RUYGROK: Correct.</p> <p>9 THE ARBITRATOR: So I have both sides' issues.</p> <p>10 Would the union like to make an opening statement or</p> <p>11 proceed to witnesses?</p> <p>12 MR. SPECKMAN: I'd like to proceed to the</p> <p>13 witnesses.</p> <p>14 THE ARBITRATOR: Okay. So we'll have to take</p> <p>15 time to call witnesses in one by one.</p> <p>16 MR. RUYGROK: The company would then reserve its</p> <p>17 right to make an opening statement since they've waived</p> <p>18 theirs.</p> <p>19 MR. SPECKMAN: That's fine. Would you like to</p> <p>20 make an opening statement?</p> <p>21 MR. RUYGROK: I said we're going to reserve it.</p> <p>22 THE ARBITRATOR: He'll reserve it until their</p> <p>23 case in chief.</p> <p>24 The union's first witness.</p> <p>25 MR. SPECKMAN: Yes, okay. I will go get my</p> <p style="text-align: right;">29</p> |

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